No. 206.

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No. 206. October Term, 1901.

Filed Feb. 25, 1902.

IN THE

Supreme Court of the United States.

PETER HAGAN and EDWARD F. MARTIN,
Petitioners,

v.

THE SCOTTISH UNION and NATIONAL INSURANCE COMPANY,
Respondents.

Argument on Behalf of Respondents

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PETER HAGAN and EDWARD F. MARTIN,

Petitioners.

v.

The SCOTTISH UNION and NATIONAL INSURANCE COMPANY.

STATEMENT OF FACTS.

On the nineteenth day of December, 1897, the respondent company issued to "Peter Hagan & Co. for account of whom it may concern," a policy of insurance against fire on the tugboat *Senator Penrose.*

On the fifteenth day of June, 1898, Peter Hagan, who with his son comprised the firm of Peter Hagan & Co., sold one-half of said steamtug to Edward F. Martin, the other libellant. No notice of this sale and transfer was given to the respondent company, nor had it any knowledge of the same, nor was it asked nor did it consent to the assignment.

It is provided by the terms of said policy, among other things,

That "if the interest of the insured be other than "unconditional and sole ownership,"

or

"if any change, other than by death of the insured,

"take place in the interest, title or possession of the sub-
"ject of insurance * * * whether by legal process
"or judgment or by voluntary act of the insured, or
"otherwise, or if this policy be assigned before the loss,"
"the entire policy shall be void."

The libellants claim that the words "for whom it may concern" entitles them to recover, notwithstanding the fact that Martin had no interest in *esse* or in contemplation at the time of the effecting the insurance and notwithstanding the assignment without the consent of the company.

The respondents contend that the words, "for whom it may concern," can and do only mean for whom it concerned, or in *contemplation*, either known or unknown, at the time of making the insurance, and that an assignment of the policy without the knowledge or consent of the company voids the policy.

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ARGUMENT.

It was decided in *De Bollé* v. *The Pennsylvania Ins. Co.*, reported in 4 Wharton, page 68, that

> "No one can claim the benefit of an insurance made "by another for account of whom it may concern, with- "out showing that it was the intention of the person "obtaining the insurance to embrace his interest in the "goods *at the time of the insurance.*"

And in *Fire Association* v. *Merchants' and Miners' Transportation Company*, reported in 7 Atlantic Reporter, page 905, the Court of Appeals of Maryland say:

> "That anyone having title to the property at the "time of the loss may, by adoption of the contract, "avail himself of its advantages, provided it be shown "that his interest was within the contemplation of the "party procuring the insurance."
>
> *Newson* v. *Douglass*, 7 Harris & Johns (Md.), 417; S. C., 16 Amer. Dec., 317.

D effected an insurance on the ship *Mohawk* in his own name, "for whom it may concern," being at the time the agent of one K, who subsequently sold the ship to N, administrator of C. In an action by N against D to recover the amount paid to him as insurance of the ship, it was held that the phrase, "whom it may concern," in a policy meant not any and everybody who might chance to have an interest in the thing insured, but such only as are in contemplation of the contract, BUCHANAN, *C. J.*, saying, "But 'whom it may concern,' is a technical phrase, common to policies of insurance, and is understood to mean not any and everybody who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract. Such a policy *supposes an agency*, and proceeding upon that ground, looks only to the principal in whose behalf or on

whose account the agent moves in the transaction, and he for whose benefit the insurance is procured is the person in the contemplation of the contract and is he whom alone it concerns.

"It is equally clear that a policy in the name of one, with the general clause 'for whom it may concern,' will cover and protect the interest of any person for whose benefit it was intended, and who *authorized it to be effected.* And if in the absence of any express order or authority from the owner or any previous communication with him upon the subject, such policy is effected in his behalf, the intention at the time of the party effecting it to cover his particular interest, will so connect him with the policy as that his adoption of it afterwards will cause it to inure to his benefit."

In the case of *DeBollé* v. *Penna. Ins. Co.*, 4 Wharton (Pa.) 68, Judge KENNEDY, speaking for the Court, adverts to the conclusion arrived at by Phillips on Ins. (1 Phillips on Ins. 383) and says: "This would not only seem to be the fair deduction from the authorities on the subject, but to be supported likewise by reason, principles of sound policy and natural justice."

As a general proposition, the clause under consideration and others of similar import, apply only to those who were contemplated at the time the insurance was made.

1 Parsons on Shipping, 46.

Citing:

Routh v. *Thompson*, 11 East., 428;
Bauday v. *Union Ins. Co.*, 2 Wash. C. C. (U. S), 391;
Catlett v. *Pacific Ins. Co.*, 1 Paine C. C. (U. S.), 594;
Haynes v. Rowe, 40 Maine, 141;
Protection Ins. Co. v. *Wilson*, 6 Ohio Stat., 553;
Seamens v. *Loring*, 1 Mason, C. C. (U. S), 127;
Lambeth v. *Western F. and M. Ins. Co.*, 11 Rob. (La.), 82, and others.

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The petitioner, however, depends upon the decision of the Supreme Court of the United States, to be found in 98 Supreme Court Reports, page 528, *Hooper* v. *Robinson.*

A careful examination of this case, we now contend, will not support his contention. The facts were substantially as follows:

The British steamer *Carolina* met with a collision in Chesapeake Bay and put back to Baltimore for repairs. She was repaired, and Hooper & Co., her agents, paid the bills and made other disbursements for her. McGarr, the captain, drew on Good Brother & Co., of Hull, England, for the amount in favor of Hooper & Co., *and at the same time directed them to protect the drawees by insurance, which was intended to be done by the policy in question.*

The policy was to James Hooper & Co. "on account of whom it may concern," in case of loss to be paid to their order. The insurance was "lost or not lost" * * * "on merchandise to cover such risks as are approved and endorsed on the policy." The instrument was a cargo policy. The draft of McGarr was bought by Brown & Sons, bankers, of Baltimore, who transmitted it to their correspondents in London. On the eleventh of November, 1872, it was accepted by Good Brothers & Co., and on the fourteenth of December, following, they paid it. On the fourteenth of November, 1872, the vessel foundered at sea. Hooper collected the insurance on January 31, 1873, and remitted the amount to Good Brothers & Co., in England.

More than a month after the loss had been paid and the money remitted to England, the Insurance Company requested Hooper to write to England and request a return of the money, which he refused to do, whereupon suit was brought against him to recover the money.

One of the questions, which arose in the case, was had Good Brothers & Co. an insurable interest. The Court say:

> "A policy, like the one here in question, in the "name of a specified party, 'on account of whom it may

"concern,' or with other equivalent terms, will be "applied to the interest of the persons for whom it was "intended by the person who ordered it, provided the "latter had the requisite authority from the former, or "they subsequently adopted it."

And to sustain this, the Court say :

"The proof as to who was intended to be insured "is that they were Good Brothers & Co., and no one "else. * * * This 'fact is established by the testimony "of Hooper, and there is none other on the subject. "He is unimpeached and his testimony is conclusive.'

"The inquiry then arises whether Good Brothers & "Co. had any insurable interest in the cargo. It does "not appear whether they had or had not. We have "suggested several ways in which such an interest may "have arisen and shown that *under the policy in question*, "it would have been sufficient, if it had subsisted at any "time before the loss was known to them. It may "possibly have arisen in other modes. * * * In "order to maintain the plaintiff's case it was necessary "to be made to appear that Good Brothers & Co., *the* "*assured, had no insurable interest.*"

It appears by the case as reported, that the Court cited the following quotation from 1 Perkins' Arnould, 238 :

"It is now clearly established that an insurable "interest, subsisting during the risk, and at the time of "loss is sufficient, and that the insured need not also "allege or prove that he was interested at the time of "effecting the policy; indeed, it is every day's practice "to effect insurance in which the allegation could not be "made with any degree of truth; as for instance, where "goods are insured on a return voyage long before they "are bought."

This only confirms, it is submitted, the general rule heretofore stated, *i. e.*, if the person effecting the insurance had in mind an intention to secure another who was likely to have

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an insurable interest, the risk would attach *when* the interest was complete, if such other person authorized the insurance in the first instance, or subsequently adopted it. It does not avoid the necessity of the person who was to be assured being in *contemplation* at the time the policy was effected.

Justice SWAYNE, if he meant anything different from this, was unfortunate in his references and examples, for he says, p. 537, citing *Worthington* v. *Bearse*, and others (12 Allen Mass., 382):

> "Where a vessel insured for a stated time was sold "and transferred, and was re-purchased and transferred "back, within that time, it has been *held that the insur-* "*ance was suspended while the title was out of the assured*, "and was revived again on the reconveyance of the "assured during the term specified in the policy."

Justice SWAYNE says further, page 539:

> "The face of the policy and other facts, patent and "notorious, which must have been known to the under- "writers, showed clearly that the advances were made "and the insurance was effected by Hooper, *not for him-* "*self*, but for others."

In Arnould Marine Insurance Edition of 1887, page 110, it is said:

> "The intention at the time of the party who directs "the insurance to be effected, is the great point to be "ascertained in determining whose interest the policy "can be applied to protect."

Can it be possible that Hagen at the time of effecting the insurance, intended to protect the interest of Martin, which interest was not in contemplation, and of which there was then no thought that it ever would exist?

If the contention of the appellee be sound, then Hagan,

acting as agent, could do that for Martin which Martin could not do for himself. How much more reasonable would it be to say that Martin, *expecting* to have an interest in the tug, requested Hagan to insure such interest for him. Martin would then be in contemplation at the time of effecting the policy, and the policy under the authorities would attach to Martin's interest as soon as the interest was complete. It might even be admitted that Hagan, expecting that Martin or someone else might have an interest, effected an insurance intended to cover such interest when vested. The authorities do not intend to go any further than this.

It has also been decided in a multitude of cases that any change in the ownership or title of the property insured makes the insurance and policy void.

In the case at bar, the *possession* of the tug was also changed, Martin taking possession as master.

Sherwood v. *Agricultural Ins. Co.*, 73 N. Y., 447;
Hine v. *Woolworth*, 93 N. Y., 75;
Smith v. *Phenix Ins. Co.*, 23 Pac. R., 383.
Fire Assocn. v. Flournoy, 19 S. W. Rep., 793;
Tallman v. *Atlantic Fire and Marine*, 29 How., 71 (N. Y.);
Abbott v. *Hampden Ins Co.*, 30 Maine, 44.

In *Schroedel* v. *Humbolt Fire Ins. Co.* (S. C. of Penna.), 158 Penna. State, 459, it was said:

> "A condition in a fire insurance policy that it shall "be void 'if the intrest of the insured be not truly stated "therein, or if the interest in the insured be other than the "unconditional and sole ownership' precludes a recovery "where the title to the property is in the insured and his "wife jointly."
>
> *Oldham* v. *Anchor Mutual Fire Ins. Co.*, 57 N.W. Rep. (Feby. 24, 1894), p. 861.

"Where a policy on property used and owned by a

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"partnership runs to the partners jointly, a condition "that the property shall not be sold or transferred, or "any change take place in the title or possession, is "broken if two of the partners sell and deliver their in- "terest to the other partner, and the latter cannot recover "to the extent of his original interest."

The facts in the present case exhibit what is practically an assignment of the policy, and the language of the contract is definite, "if this policy be assigned before a loss," or "if the interest of the insured be other than unconditional and sole ownership" * * * or "if any change other than by death of the insured take place in the interest, title or possession of the subject of insurance,"the policy was to be void.

It is, however, claimed by the petitioners that the clauses last above referred to are in contravention of the clause *written* in the policy "for account of whom it may concern," and some stress seems to be laid upon the word "may" in the clause, as indictating future interest or ownership. Even admitting this to be true (and it is not necessarily certain that the word "may," in the clause, might not as well mean *may now* as *may hereafter*, still, we contend the future interest or ownership must, under the authorities, *be in contemplation*, when the insurance is made.

It is quite frequently the practice to sell bills of lading representing cargo with an insurance note attached, to whatever banker or broker, who may be disposed to purchase, but this banker or broker, or whoever may hold the bill of lading is the very person in contemplation, when the insurance is effected and was intended.

This, however, is not like the case now here presented. The policy in question was an insurance on the hull of a steamboat against fire, and ran for one year.

The court below has well said, that the clauses referred to are not repugnant. "That the policy was issued for account of whom it might concern is undeniable, but whom could it concern? Possibly the then existing or future

creditors of the boat, or perhaps the constituents of Peter Hagan and Company; but no matter for whose account the insurance may have been effected, it cannot be supposed that it was taken for the benefit of anyone who, by the express, though printed, terms of the contract, was distinctly excluded from having or acquiring any interest under it."

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